Filed 2/19/19 In re Gonzalez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ENRIQUE GONZALEZ on Habeas Corpus.	B285807 (Los Angeles County Super. Ct. No. BA261252) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING CHANGE IN JUDGMENT

THE COURT:*

We modify the opinion to make clear the determination of the impact of Senate Bill No. 1437, including whether Gonzalez must petition for relief pursuant to section 1170.95, is properly addressed by the trial court in the first instance. The opinion herein, filed on January 23, 2019, is modified as follows.

In the Disposition, delete the last sentence and replace it with the following sentence:

If the People elect not to retry Gonzalez, the trial court shall conduct proceedings consistent with this opinion and with the provisions of sections 188, subdivision (a)(3), as amended, and 1170.95, as may be applicable in light of our decision vacating Gonzalez's murder conviction, and thereafter resentence him and enter judgment accordingly.

There is a change in judgment.
Respondent's petition for rehearing is denied.

Filed 1/23/19 In re Gonzalez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ENRIQUE GONZALEZ on Habeas Corpus.	B285807 (Los Angeles County Super. Ct. No. BA261252)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Curtis B. Rappe, Judge. Petition granted.

Victor J. Morse, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Idan Ivri, Deputy Attorneys General, for Respondent.

A jury convicted Enrique Gonzalez of the 2004 first degree murder of Gregory Gabriel, who was shot by Gonzalez's friend, Carlos Argueta. We affirmed Gonzalez's conviction, but remanded to the trial court for resentencing as to the firearm enhancements. (*People v. Gonzalez* (Apr. 29, 2008, B197530) [nonpub. opn.] (*Gonzalez I*).)[1] In 2008 the Supreme Court denied review (No. S164046).

On June 2, 2014 the Supreme Court held in *People v. Chiu* that the natural and probable consequences theory of aiding and abetting a crime cannot be the basis for convicting a defendant of first degree murder. (*People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*).) On October 20, 2017 Gonzalez filed a petition for a writ of habeas corpus seeking relief from his first degree murder conviction under *Chiu*. Although we summarily denied the petition, the Supreme Court granted Gonzalez's petition for review, directing this court to vacate our order denying the petition pursuant to *Chiu* and *In re Martinez* (2017) 3 Cal.5th 1216 (*Martinez*). We now grant the petition.

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[1] We also affirmed Gonzalez's conviction of the attempted murders of three of Gabriel's friends and a night club patron present at the time of the shooting and the attempted murder of two other individuals several days later. (*Gonzalez I, supra*, B197530.) The six attempted murder convictions are not at issue in this petition.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Evidence at Trial*[2]

Gonzalez and Argueta belonged to a "tag-banging" group called "T.C.A." A tag-banging group is a tagging crew whose activities have escalated to include crimes, but the police have not yet categorized the group as a criminal street gang. Gonzalez's moniker was "Epic Loc."

1. *The Shooting on February 13, 2004*

On February 13, 2004 Francisco Amezcua was in his car near a night club with two of his friends. When he heard shots, he became scared and started to drive away. As he drove away, he backed into a small red car with two men inside. The men looked angry. Amezcua pulled forward, but the red car pulled around him. Argueta was a passenger in the red car, and fired nine shots into Amezcua's car. Amezcua and one friend survived, but the other friend was killed.

Argueta used a Sten Mark submachine gun, which required two hands to carry and operate. Its magazine held 32 nine-millimeter bullets, and could be shot in either a semi-automatic or fully automatic mode.

2. *The Shooting on February 14, 2004*

On February 14, 2004 four school friends went to a night club—12-year-old Gregory Gabriel, 14-year-old Marvin Emmanuel, 15-year-old Camille Johnson, and Johnson's sister, 13-year-old Girnet Hart. Johnson noticed the people at the club

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[2] We take the discussion of the evidence at trial from *Gonzalez I, supra*, B197530.

seemed older and largely Hispanic. Emmanuel told Gabriel, "[T]here were too many Mexicans." Gonzalez overheard the remark and walked over to the group. He asked what they had said about Mexicans. The minors denied saying anything. Gonzalez responded, "You fools talking about Mexicans." Gonzalez "threw out" the letters of his crew T.C.A. as he continued to ask what they had said. Hart became scared because she believed Gonzalez would not be "throwing out" letters unless it was connected to a gang.

Gonzalez became angry. He asked Gabriel and Emmanuel, "Where are you from?" They responded they were just students, and denied being from anywhere. Johnson recognized Gonzalez's question as a challenge. She knew when a gang member asks this question it meant there was "going to be a conflict. A big conflict." Hart ran across the street and started praying.

Gonzalez called out to Argueta, who was standing across the street. Gonzalez told him to come over and "bring the strap." Argueta approached holding the Sten Mark gun in two hands. Gonzalez told him, "These fools was talking about Mexicans." Gonzalez told Argueta they did not know T.C.A. One of the friends asked what T.C.A. stood for, and either Gonzalez or Argueta told them. Argueta and Gonzalez were angry. Argueta pointed his gun in Johnson's face. Johnson asked Argueta if he was going to shoot her. Argueta smiled, then pointed the gun at Emmanuel and Gabriel. They were very scared, and Gabriel started crying.

A security guard told Argueta, "[T]hese are kids. Don't be bothering them." Gonzalez said, "No. They disrespected us." Argueta added, "I don't care. They disrespecting T.C.A." Johnson started to walk away, and Emmanuel and Gabriel followed. Gonzalez and Argueta walked back across the street.

Thinking the crisis was over, Hart recrossed the street to join her sister.

Seconds later gunshots were fired. Everyone tried to run into the club. Hart was hit twice by the bullets. She ran into the club's bathroom and collapsed. Gabriel was hit twice in his back and fell on the sidewalk. Another club patron, Rene Jesus Jimenez, was on the sidewalk when several bullets struck his chest. Gabriel died that night from two bullets to his back. Jimenez and Hart were severely injured, but survived. Officers found 21 nine-millimeter shell casings at the scene.

3. *The Shooting on February 19, 2004*

Argueta's younger brother Johnny was charged with a serious felony unrelated to this case. After a preliminary hearing on February 19, 2004, the court held Johnny to answer on the charge. Argueta was disruptive during the preliminary hearing, murmuring comments about the witnesses and intimidating them with stares. On the day Johnny was held to answer, Argueta yelled expletives at the witnesses and "gave them the finger" as deputies escorted them from the courtroom.

Miguel Ramos testified on February 19, 2004. His friend Robert Carrillo came to court with him for moral support. That afternoon Ramos drove his vehicle with Carrillo in the passenger seat. They passed Argueta's red car. Gonzalez was driving; Argueta sat in the passenger seat with the Sten Mark gun. Gonzalez made a U-turn and pulled behind Ramos. After a few blocks Ramos noticed Argueta and Gonzalez following him. Ramos tried to evade the red car by speeding down side streets and ignoring stop signs, but he could not get away.

After 15 or 20 blocks, Argueta opened fire on Ramos's car. A bullet shattered his rear window, and Carrillo felt a stabbing in

his back. The bullet put a hole in Carrillo's shirt and burned the skin on his back. Ramos crashed, and he and Carrillo ran away. Gonzalez sped off.

B. *Gonzalez's Arrest and Statement*

The police subsequently arrested Argueta and Gonzalez together. An officer investigating the February 19, 2004 shooting of Ramos and Carrillo interviewed Gonzalez, who gave a written statement. Gonzalez stated he and Argueta followed Ramos's car until it crashed. Gonzalez drove Argueta's red car with Argueta in the passenger seat. Argueta fired a shot through the back window of Ramos's car.

Next, officers investigating Gabriel's murder interviewed Gonzalez. The jury heard a tape of this interview. Gonzalez admitted he got angry when he heard Emmanuel say, "There's too many Mexicans up in here." He said he argued with the "black people." Gonzalez claimed T.C.A. and his moniker "Epic Loc." Gonzalez admitted he called Argueta "over and told him to bring the strap." At the detectives' suggestion, Gonzalez agreed he wanted only to scare Emmanuel, Gabriel, Johnson, and Hart. Gonzalez stated they "started the argument, I guess, I took it to the next level or whatever. He didn't have to start shooting."

Gonzalez denied being with Argueta the night of the February 13, 2004 shooting. But he admitted he had known about the shooting when he called Argueta over and told him to bring his "strap." Argueta told him he "let off on some fools cause they crashed into his car."

C. *Gang Expert Testimony*

Detective Jeff Cortina testified as a gang expert. Cortina explained T.C.A. is a "tag-banging crew," which he described as a

tagging crew involved in criminal activity. He said the purpose of "throwing out" the name T.C.A. and claiming a moniker is to announce that "if you disrespect my group or me that there is going to be consequences." Cortina said the question, "Where are you from?" has no right answer. It is meant to trigger a confrontation. "You've got a second to either back down, run[,] or stand up, be willing to take what is coming." Cortina testified gang members crave respect and believe they must punish expressions of disrespect, including race-based comments or insults.

D. *Jury Instructions and Closing Argument*

The trial court instructed the jury with CALCRIM Nos. 400 and 401 on direct aider and abettor liability for the first degree murder of Gabriel, as well as CALCRIM No. 403 regarding the natural and probable consequences doctrine. The trial court also instructed the jury that it did not need to agree unanimously on the theory of liability.

CALCRIM No. 403 provides in part, as read to the jury, "To prove that the defendant is guilty of murder or attempted murder under the natural and probable consequence doctrine, the People must prove that, (1) The defendant is guilty of assault with a firearm; (2) During the commission of the assault with a firearm, the crimes of murder and attempted murder were committed; AND (3) Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder or attempted murder was a natural and probable consequence of the commission of the assault with a firearm."

During her closing argument, the prosecutor first addressed direct aider and abettor liability for the first degree murder of Gabriel. She argued, "[T]his is what [Gonzalez] knew

he was going to do and that's what he intended, to aid and abet a shooting and he is legally and morally as responsible as Argueta who pulled the trigger." The prosecutor then argued the jury could convict Gonzalez in the alternative under the natural and probable consequences doctrine. She argued, "[L]et's say there [are] a few of you who just don't think that the evidence proves to you that [Gonzalez] intended to aid and abet a shooting. [¶] Maybe you think—maybe you believe and you're going to give him the benefit of the doubt even though he's already lied to you about the other shooting on February 19—maybe you're going to give him that benefit of the doubt and believe that he only intended to scare those kids despite everything that you've heard. [¶] I'm going to tell you it doesn't matter. He's still guilty."

The prosecutor provided a detailed analysis of the natural and probable consequences doctrine, including an analogy: if a child intends to break a neighbor's window by throwing a baseball through the window, the child is then also responsible for any other items that are broken in the neighbor's house, even if the child did not intend to break anything else. The prosecutor then described the elements of an assault with a firearm, and explained how an intent to commit an assault with a firearm would foreseeably result in murder.

She argued, "And if you believe [Gonzalez's] statements that he only intended to scare those kids when he called Carlos over with this gun even if you give him that benefit of the doubt he has aided and abetted an assault with a firearm. [¶] . . . Now, if you believe he intended to aid and abet that assault with a firearm and using your common sense you believe that it was a foreseeable result given all the circumstances under an objective standard that that shooting was foreseeable then he's on the hook." Finally, the prosecutor emphasized the jurors did not

have to agree unanimously on the theory on which they convicted Gonzalez.

E. *The Verdict and Sentencing*

The jury convicted Gonzalez of the first degree murder of Gabriel (§ 187, subd. (a)) and the attempted, premeditated, deliberate, and willful murders of Hart, Jiminez, Emmanuel, Johnson, Carrillo, and Ramos (§§ 664/187, subd. (a).). The jury also found true as to each count the allegations Gonzalez knew a principal was personally armed with a firearm in the commission of the offenses. (§ 12022, subd. (d).)

The trial court sentenced Gonzalez to 25 years to life on the murder count, plus a consecutive term of two years for the firearm enhancement. The trial court also imposed six consecutive life terms for each of Gonzalez's attempted murder convictions.

DISCUSSION

A. *Gonzalez's Petition Is Timely*

The People contend Gonzalez's petition is time-barred because it was filed over three years after *Chiu* was decided. We disagree.

There is no specific time limit by which a petitioner must file a petition for a writ of habeas corpus. (*In re Reno* (2012) 55 Cal.4th 428, 460 (*Reno*) [nine-year delay after filing prior habeas petition was substantial and lacked good cause, but some of petitioner's claims fell within an exception for a conviction under an invalid statute]; *In re Huddleston* (1969) 71 Cal.2d 1031, 1034 [two and one-half-year delay after issuance of Supreme Court decision changing law before filing petition not

unreasonable]; *In re Douglas* (2011) 200 Cal.App.4th 236, 242 [habeas petition was untimely because defendant failed to justify 12-year delay before filing the petition].) Rather, "'California courts "appl[y] a general 'reasonableness' standard" to judge whether a habeas petition is timely filed.'" (*Reno*, at p. 460; accord, *Walker v. Martin* (2011) 562 U.S. 307, 311 [California courts "'appl[y] a general "reasonableness" standard'" to determine timeliness of habeas petitions].)

Whether there has been substantial delay is measured from when a petitioner or petitioner's counsel knew or reasonably should have known of the underlying basis for the petition. (*Reno*, *supra*, 55 Cal.4th at p. 461; *In re Robbins* (1998) 18 Cal.4th 770, 780 (*Robbins*).) The petitioner bears the burden of demonstrating his or her petition is timely. (*Reno*, at p. 463; *Robbins*, at p. 780.) Even if there is substantial delay before the filing of a petition, we will consider the petition on the merits if the petitioner can demonstrate good cause for the delay. (*Reno*, at p. 460; *Robbins*, at p. 780.)

Gonzalez's conviction was final when the Supreme Court denied review in 2008. Thereafter, Gonzalez filed a federal habeas corpus petition in 2008, a state habeas corpus petition in 2009, and a second state habeas corpus petition in 2011. All three petitions were denied. At the time *Chiu* was decided on June 2, 2014, Gonzalez was incarcerated, had no pending appeal or petitions, and did not have legal representation. In March 2017 Gonzalez's mother contacted the California Appellate Project (CAP) to request the record from Gonzalez's appeal so Gonzalez could seek relief based on the decision in *Chiu*. On March 23, 2017 a CAP attorney contacted attorney Victor Morse, who represented Gonzalez on appeal. The CAP attorney suggested Morse represent Gonzalez in filing a petition for a writ

of habeas corpus. Morse reviewed his notes from the appeal, and determined Gonzalez had a meritorious claim under *Chiu*. Morse contacted Gonzalez in state prison, and agreed to prepare and file a petition for a writ of habeas corpus.[3]

During the seven-month period from March 23, 2017, when Morse was first contacted, until October 20, 2017, when he filed the petition, Morse diligently investigated Gonzalez's *Chiu* claim and prepared the petition. Morse reviewed his notes from his work on Gonzalez's direct appeal to determine whether Gonzalez had a meritorious *Chiu* claim, contacted Gonzalez to offer to prepare and file the petition, and requested assistance from CAP in obtaining the record from the direct appeal. On May 19, 2017 CAP sent Gonzalez's attorney a copy of the record. Five months later Morse filed the instant petition.

The cases on which the People rely are distinguishable. In *In re Gallego* (1998) 18 Cal.4th 825 (*Gallego*), the Supreme Court found a delay of four years and ten months was substantial where the petitioner failed to provide detail on when he and his attorney obtained the information supporting his habeas petition, and why they did not know or reasonably know the information at an earlier time. (*Id.* at pp. 829-830, 837-838.)

In re Stankewitz is also inapposite because the petitioner in that case had obtained the juror declarations on which he based his habeas claim 18 months before filing his petition. (*In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1.) In addition, although the Supreme Court concluded there was substantial delay, it found petitioner had justified the delay in that he had

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[3] The record does not indicate when Gonzalez first learned of the decision in *Chiu*. It appears from the chronology, however, that this occurred sometime in 2017, before Gonzalez's mother contacted CAP.

relied on a narrow reading of two cases to support his decision to wait to file his habeas petition simultaneously with the opening brief in his automatic appeal. (*Ibid.*)

Here, the delay was substantially shorter than the four-year 10-month delay in *Gallego*. Although the record does not show precisely when in 2017 Gonzalez learned of the *Chiu* decision, this occurred sometime in the two years 10 months after *Chiu* was decided (prior to when Gonzalez's mother contacted CAP on March 23, 2017). We conclude this delay was not unreasonable given that at the time *Chiu* was decided, Gonzalez was incarcerated, had no pending appeals or petitions, and had no legal representation.[4]

Once Morse was contacted, a seven-month period during which he contacted Gonzalez, obtained the record, investigated whether Gonzalez had a valid claim, and prepared and filed the petition was not unreasonable. (*Reno*, *supra*, 55 Cal.4th at p. 460.)

B. *Aider and Abettor Liability*

We review instructional error claims de novo (*People v. Posey* (2004) 32 Cal.4th 193, 218; *In re Loza* (2018) 27 Cal.App.5th 797 (*Loza*).)

A criminal defendant may be convicted of a crime either as a perpetrator or as an aider and abettor. (Pen. Code, § 31.) "An aider and abettor can be held liable for crimes that were intentionally aided and abetted (target offenses); an aider and abettor can also be held liable for any crimes that were not intended, but were reasonably foreseeable (nontarget offenses).

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[4] Even if we were to conclude the delay was substantial, these same factors would support a finding of good cause.

[Citation.] Liability for intentional, target offenses is known as 'direct' aider and abettor liability; liability for unintentional, nontarget offenses is known as the ""natural and probable consequences' doctrine."""" (*Loza*, *supra*, 27 Cal.App.5th at p. 801; accord, *Chiu, supra*, 59 Cal.4th at p. 161 [""A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.""].)

A direct aider and abettor acts "'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the [target] offense.'" (*Chiu*, *supra*, 59 Cal.4th at p. 161.) An aider and abettor is liable for the nontarget offense under the natural and probable consequence doctrine if a "reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*Id.* at p. 162.) As an example, if a person "aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*Id.* at p. 161.)

In *Chiu*, the Supreme Court held that the natural and probable consequences theory of aider and abettor liability cannot be relied on to convict a defendant of first degree premeditated murder. (*Chiu*, *supra*, 59 Cal.4th at p. 167.) The premeditation and deliberation mens rea required in first degree murder "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death."

(*Id*. at p. 166.) Thus, under the natural and probable consequences theory, "the connection between the [aider and abettor's] culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder." (*Ibid*.) However, a defendant may still be convicted of first degree murder under a direct aider and abettor theory. (*Ibid*.)

C. *Harmless Error*

As the Supreme Court held in *Chiu*, when the trial court instructs the jury on aider and abettor liability under both the direct and the natural and probable consequences theories of guilt, one of which was legally correct and one legally incorrect, the "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) In *Martinez*, the Supreme Court applied the same harmless error analysis to a petition for a writ of habeas corpus. (*Martinez, supra*, 3 Cal.5th at p. 1218 ["We hold that on a petition for writ of habeas corpus, as on direct appeal, *Chiu* error requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder."].)

An error is harmless when "'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' under a legally valid theory." (*Martinez, supra*, 3 Cal.5th at p. 1226.) The prosecution "'has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict.'" (*Loza, supra*, 27 Cal.App.5th at p. 805; accord, *People v. Woods* (2006) 146 Cal.App.4th 106, 117; see

Martinez, supra, 3 Cal.5th at p. 1227 ["we conclude that the Attorney General has not shown beyond a reasonable doubt that the jury relied on a legally valid theory in convicting [the defendant] of first degree murder"].)

Reversal is required where "the record does not permit us to rule out a reasonable possibility that the jury relied on the invalid natural and probable consequences theory in convicting [the defendant] of first degree murder." (*Martinez, supra*, 3 Cal.5th at p. 1226.) In this situation, the "erroneous instruction deprives a defendant of the right to a jury trial under the Sixth Amendment to the United States Constitution. . . ." (*Id.* at p. 1224.)

In evaluating whether *Chiu* error was harmless, we may look to the prosecutor's closing argument. (*Martinez, supra*, 3 Cal.5th at pp. 1226-1227 [the conclusion that the jury relied on the natural and probable consequence doctrine "is bolstered by the fact that the prosecutor argued the natural and probable consequences theory to the jury at length during closing argument and rebuttal"]; *Loza, supra*, 27 Cal.App.5th at p. 805 [the "'likely damage is best understood by taking the word of the prosecutor, . . . during closing arguments'"], quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 444.)

D. *We Cannot Conclude Beyond a Reasonable Doubt That the Jury Based Its Verdict on the Legally Valid Theory That Gonzalez Directly Aided and Abetted the Premeditated Murder*

The People concede the trial court committed *Chiu* error when it instructed the jury under both the legally valid direct aider and abettor theory and the legally invalid natural and probable consequences theory of first degree murder. However,

the People contend the record supports the conclusion beyond a reasonable doubt that the jury relied on the valid direct aider and abettor theory in convicting Gonzalez. We disagree.

Gonzalez told law enforcement he only intended to scare the minors, not for Argueta to shoot them. This was consistent with the minors' testimony. There is no dispute Gonzalez initiated the quarrel with Gabriel, Emmanuel, Johnson, and Hart by confronting them about their comments concerning Mexicans, identifying his tag-banging affiliation, and asking them, "where are you from?" Gonzalez then summoned Argueta and instructed him to "bring the strap." Argueta brought over the Sten Mark gun and pointed it at Johnson's face. He smiled when she asked him if he was going to shoot her, then pointed the gun at Emmanuel and Gabriel. After a security guard intervened, Gonzalez and Argueta walked across the street. Hart believed she was no longer in danger, and walked back across the street to join her friends. That is when Argueta began shooting at the group of youths, killing Gabriel.

A rational juror could reasonably conclude Gonzalez only intended that Argueta use the gun to instill fear in the minors by pointing it at them, not to kill them. By the time Argueta started shooting, he and Gonzalez had crossed the street and the quarrel with the minors had ended or at least paused. Significantly, the prosecutor in her closing argument argued the jury could convict Gonzalez of first degree murder under the natural and probable consequences doctrine even if he only intended to scare the youths. She concluded, "if you believe he intended to aid and abet that assault with a firearm and . . . you believe . . . that that shooting was foreseeable then he's on the hook." The prosecutor also emphasized that the jury did not need to agree unanimously

on the theory of aiding and abetting to convict Gonzalez of first degree murder.

The People contend Gonzalez's knowledge of Argueta's use of the Sten Mark gun to shoot people during the incidents before and after the February 14 shooting shows that Gonzalez shared Argueta's murderous intent. Specifically, Gonzalez admitted knowing that Argueta fired the Sten Mark gun at a car the day before Gabriel's murder and then was in the car with Argueta days after Gabriel's murder when Argueta fired his gun at Ramos's car. Thus, the People argue, because Gonzalez knew of Argueta's proclivity for firing his gun based on perceived slights, summoning Argueta to bring his gun could only mean Gonzalez intended for Argueta to shoot and kill Gabriel. While this may be a persuasive argument that the People could and did make to the jury, it is by no means the only rational explanation for Gonzalez's actions.

Here, as in *Loza*, "[b]ecause the prosecutor urged the jurors to consider and utilize the natural and probable consequence theory, we cannot find beyond a reasonable doubt that one or more of the jurors may have relied upon it." (*Loza, supra*, 27 Cal.App.5th at p. 806.) The People therefore have not shown beyond a reasonable doubt the jury relied on the legally valid theory of direct aider and abettor theory of liability in convicting Gonzalez of first degree murder. (*Martinez, supra*, 3 Cal.5th at p. 1227.)

DISPOSITION

Gonzalez's petition for a writ of habeas corpus is granted, and his conviction for first degree murder is vacated. If the People elect not to retry Gonzalez, the trial court shall enter

judgment consistent with section 189, subdivision (a)(3), as amended by Senate Bill No. 1437 (2017-2018 Reg. Sess.), and resentence him accordingly.[5]

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.

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* ZELON, Acting P. J. SEGAL, J. FEUER, J.

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[5] On September 30, 2018 Senate Bill No. 1437 (2017-2018 Reg. Sess.) was signed into law, effective January 1, 2019. The bill amended sections 188 and 189 to limit who can be liable for murder under a theory of felony murder or the natural and probable consequences doctrine. With respect to the natural and probable consequence theory of liability, amended section 188, subdivision (a)(3), provides that "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." Under this section, an aider and abettor cannot be convicted of either first or second degree murder based on the natural and probable consequences doctrine. The law is retroactive, and allows a defendant to petition for resentencing, regardless of the date of the conviction. (§ 1170.95, subd. (a).)